87-1854

No. 87—

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

Bill J. Cory,

Petitioner,

v.

Standard Federal Savings and
Loan Association, Marvin R. Lang,
and Robert W. Zaugg,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Bill J. Cory, Pro Se
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QUESTION PRESENTED

Whether the court of appeals applied the proper standard in determining that forty-three (43) acts of alleged wire and mail fraud over a forty (40) month period failed to constitute a "pattern of racketeering activity" under RICO as defined by Title 18 U.S.C. § 1961(5).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Bill J. Cory, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this matter on 31 March 1988.

OPINIONS BELOW

The 31 March 1988 unreported opinion of the Court of Appeals for the Fourth Circuit whose judgment is herein sought to be reviewed is reprinted in attached Appendix A, A-3. The order of the United States District Court for the District of Maryland entered 5 October 1987 is reprinted in Appendix A, A-6. The prior Memorandum and Order of the United States District Court for the District of Maryland filed 21 September 1987 is reprinted in Appendix A, A-8. The Report and Recommendation of the United States Magistrate to the United States District Court for the District of Maryland filed 29 May 1987 is set forth in Appendix A, A-24.

JURISDICTION

The Opinion of the Court of Appeals for the Fourth Circuit was entered 31 March 1988. This Petition is timely under 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. § § 1961, 1962, 1964, 1341, 1343, and 2314 are reprinted in relevant part in Appendix B.

STATEMENT OF CASE

This case arises from a claim for damages by the Petitioner against Standard Federal Savings and Loan Association, et al., under the Organized Crime Control Act of 1970, more specifically Racketeer Influenced and Corrupt Organizations (RICO), 18 U.S.C. § 1961 et seq. In January 1983 Standard Federal induced the Public to deposit money in its T-Bill Plus account through advertising by promising to pay depositors a minimum rate of interest based on U.S. Treasury Bill auctions. The Petitioner complied with the T-Bill Plus deposit requirements and was provided a contract of deposit which stated, "The interest rate paid to depositors shall never be less than the average auction discount rate of the 13 week Treasury Bill, established at the latest U.S. Treasury Auction, plus one per cent (1%)." The terms of the contract of deposit contained a most important attraction that interest rates set by

the Board of Directors could be higher, thusly increasing depositors' earnings. The foregoing was additionally guaranteed by separate letter from the Executive Vice President of Standard Federal.

Standard Federal omitted the rate of interest paid on almost all the monthly statements and the T-Bill auction rate was never listed, thusly, the underpayment of interest was not easily detectable. After several unsatisfactory inquiries to Standard Federal, the Petitioner computed the rates of interest paid by Standard, and obtained a listing of the weekly T-Bill auction discount rates from the U.S. Department of the Treasury. A comparison of these interest rates showed that T-Bill Plus depositors were underpaid interest 36 out of the 40 monthly pay periods considered, and that on occasion the interest rate paid was almost 2% below the minimum interest rate promised in the contract of deposit. Depositors have been constantly underpaid earned interest by Standard since 1983 to the present time. Although Standard had been in business since 1966 to amass

assets of $373 million (Form 10-K, FY 1982), per share earnings increased astronomically and over $600 million (Form 10-Q, Sep. 1985) was added to almost triple its assets in 3 years, the same time period covered by the Complaint.

This suit, filed on 8 May 1986 in the United States District Court for the District of Maryland under the provisions of RICO (18 U.S.C. § § 1961-68), alleged the respondents violated 18 U.S.C § 1962(a), (b), (c), and (d) (App. B-2) by using the U.S. Mail (18 U.S.C. § 1341, App. B-4) and wire (18 U.S.C. § 1343, App. B-4) to defraud depositors of rightfully earned interest on depository accounts; and to transfer these fraudently gained funds through interstate commerce in violation of 18 U.S.C. § 2314 (App. B-5). State law violations were alleged under pendent Code of Maryland, Article Financial Institutions, other statutes, and common laws. The first Amended Complaint seeking certification as a class action was filed on 18 June 1987. Upon assignment by the district court, the United States Magistrate filed his Report

and Recommendation (App. A-24) on 29 May 1987 which set forth that the Complaint should be dismissed for failure to allege a pattern of racketeering activity and a distinct person/enterprise relationship. The district court adopted the Magistrate's Report and Recommendation on 21 September 1987 (App. A-8) stating that only one act, the nonpayment of correct interest, does not constitute a pattern of racketeering under RICO, and that the person/enterprise relationship has not been satisfied. The first Amended Complaint was not noticed in the district court's 21 September 1987 memorandum, but was rejected by Order of 5 October 1987 (App. A-6) for the same reasons as the Complaint and for lack of timeliness. On 31 March 1988, the United States Court of Appeals for the Fourth Circuit affirmed the district court's decision and stated that the alleged conduct failed to constitute a RICO pattern, but did not address the district court's enterprise findings. The Petitioner now seeks certiorari to the United States Court of Appeals for the Fourth Circuit.

REASONS FOR GRANTING THE WRIT

I. The "RICO pattern" should be Standardized among the Federal Circuits.

The notion propounded by the courts of the Fourth Circuit that multiple criminal episodes are necessary to state a claim upon which relief can be granted is contrary to RICO statutory requirements. The Fourth Circuit courts have used the terms scheme/episode and continuity/relatedness as being reciprocally connected, and applied various interpretations to these relationships which cause unfair dismissal of person instituted civil RICO claims.

The "pattern of racketeering activity" governs a cause of action under RICO by encompassing the total violation since it is contained in § 1962(a), (b), (c), and conspiracy (d) is contingent upon (a), (b), and (c) (App. B-2). The Petitioner alleged forty-three (43) acts using wire and the U.S. Mail to defraud T-Bill Plus depositors. These acts on the part of Standard Federal, et al., included: (a) false advertising to induce the Public to entrust and deposit money; (b) a

false promise to pay rates of interest as specified within the terms of the contract of deposit; (c) the issuance of an offer using false pretenses by guaranteeing the interest rates to be paid; (d) repeated attempts to conceal the fraud by failing to list and supply interest information upon request and (e) thirty-six underpayments of earned interest paid monthly over a forty (40) month period of time. All forty-three (43) acts of mail and wire fraud were necessary for fruitation of the scheme. The fraud has continued and currently T-Bill Plus depositors are being underpaid interest. This district court stated, "This court finds that there is only one act complained of, namely, the nonpayment of the correct interest rate . . . This one act . . . does not establish the pattern of racketeering activity necessary for plaintiff to prosecute a civil RICO case" (App. A-13). The Fourth Circuit affirmed, ". . . the complaint still failed to charge the kind and degree of continuous engagement in criminal conduct required to constitute a RICO 'pattern'" (App. A-4). The Petitioner points out that, in addition to the

numerous fraudulent acts which caused him injury, he had requested certification as a class action in his first Amended Complaint which necessarily included an unspecified number of victims and additional criminal acts.

In *Eastern Publishing & Advertising, Inc.*, v. *Chesapeake Publishing & Advertising, Inc.*, 831 F. 2d 488, 492 (4th Cir. 1987), and *International Data Bank, Ltd.*, v. *Zepkin*, 812 F. 2d 149 (4th Cir. 1987), the Fourth Circuit held that the alleged fraudulent acts were part of a single limited scheme to defraud and that a pattern of racketeering activity had not been alleged. The U.S. Magistrate's Report and Recommendation submitted in this case references *Gatoil (U.S.A.), Inc.*, v. *Forest Hill State Bank, et al.*, CA No. JH 84-873 (D. Md. 1986) (unreported) which also held that one criminal episode did not constitute a "RICO pattern." Several Circuits have not incorporated the multiple episode theory in their findings. In the Third Circuit case, *Agency Holding Corp.* v. *Malley-Duff & Associates*, 107 S. Ct. 2759

(1987), the RICO claim was supported by two alleged incidents: (a) Crown Life, et al., acquired various crown life agencies by false and fraudulent pretenses, and (b) Crown Life obstructed justice during the course of discovery. *In Bank of America v. Touche Ross & Co.*, 782 F. 2d 971 (11th Cir. 1986) five banks sued under civil RICO alleging nine acts of wire and mail fraud over a three year period. The Eleventh Circuit stated that the wire and mail fraud acts comprised a single scheme, and held that the pattern of racketeering activity requirement has been sufficiently alleged. The Seventh Circuit in *Morgan v. Bank of Waukegan* 804 F. 2d 975 (7th Cir. 1986), stated that ". . . the mere fact that the predicate acts relate to the same overall scheme or involve the same victim does not mean that the acts automatically fail to satisfy the pattern requirement." In *Illinois Department of Revenue v. Phillips*, 771 F. 2d 312 (7th Cir. 1985), the Seventh Circuit concluded a pattern of racketeering has been sufficiently alleged. "In *Phillips*, the defendant mailed nine separate fraudulent

state sales tax returns to the state over a nine-month period. These mailings were clearly distinct transactions ongoing over a period of time: each tax return was a separate lie and resulted in a separate underpayment, independent of the other lies and underpayments." See *Morgan* at 976. The Courts of the First, Second, Third, Seventh, Ninth, and Eleventh Circuits do not ascribe to the multiple episode requirement.

The Petitioner contends that in a different Circuit, the fraudulent acts alleged in this suit would have ascribed a RICO pattern of racketeering activity. Until this Honorable Court ameliorates the RICO pattern differences between Circuits, the ends of justice standard cannot be met uniformly and fairly throughout the federal court system.

II. The Court's "pattern" Requirement Conflicts with the Terms of the RICO Statute.

A pattern is any object or act which is sufficiently defined so it can be used as a guide to duplicate or repeat itself. The RICO "pattern of racketeering activity" requires the pattern to be used at least one time to repeat itself, thereby establishing at least two acts of racketeering activity as set forth in § 1961(5) (App. B-2). RICO is a criminal statute which sets forth the requirement for *only one* pattern of racketeering activity. This single racketeering pattern requirement is supported by the commission of felanious acts listed in 1961(1) (App. B-1), and is the "one and the same" requirement whether the suit is criminal or civil in nature. Further, this RICO pattern is established by all overt criminal acts committed by the wrongdoer, rather than as a consequence of tabulating harmful acts against the victim as seemingly the courts of the Fourth Circuit have held and used to dismiss civil RICO suits.

In the Fourth Circuit the courts have found that one victim limits the criminal activity to a single episode, which in turn fails to establish a RICO pattern. When one contemplates crimes more serious than fraud, this one-victim, one-episode theory fails to survive the intent of RICO. If the one-victim, one-criminal episode theory is consistently applied, the Attorney General would be unable to prosecute either civil or criminal actions where there was only one victim, even though that victim had been injured by several criminal acts.

However, the Fourth Circuit and other courts promulgating the one-victim, one-episode theory vacilate by not applying the theory evenly or, in some cases, circumvent their previous findings by classifying events in a different manner. In *U.S. v. Computer Science Corp.*, 689 F. 2d 1181 (4th Cir. 1983), thirty-six acts of mail and wire fraud supported a claim under § 1962(c) where the only victim was the General Services Administration. Only one scheme existed, namely, the attempt of one corporation to defraud the

United States. The Eighth Circuit, in *United States v. Kragness*, 830 F. 2d 842 (8th Cir. 1987), found three separate schemes: (a) importing marijuana into La Junta; (b) importing marijuana into the Phoenix area; and (c) a cocaine-and-quaalude scheme. Had *Kragness* been a person instituted civil RICO complaint, the court may have found a single scheme; i.e., the repeated act of unlawfully importing illegal drugs to carry out the same criminal activity. Such a finding would have been consistent with the district court's reasoning in this case, i.e., the one act of nonpayment of the correct interest rate was repeated to carry out the same criminal activity (App. A-13).

A person has the right to sue under § 1964(c) (App. B-3) if he has been harmed in his business or property by reason of a violation of § 1962. Only one injury is required and all criminal acts conducted by the perpetrators may be used to estabish a pattern of racketeering activity. However, a person seldom has standing to complain of or prove criminal acts against others, and necessarily must establish the pattern of

racketeering against himself as the victim. Certainly lower courts have unfairly placed an added restriction on person instituted RICO suits by finding that if there is only one victim, only one criminal episode can result. The terms of the statute set forth the requirements for only one RICO pattern. Severe criminal acts against a victim can be postulated, and if this same RICO pattern is uniformly applied, the Attorney General would be prohibited from bringing a RICO charge.

III. The "Pattern of Racketeering Activity" does not Require a Scheme or Episode.

The terms of RICO § § 1961-68, do not contain a requirement for either a scheme or criminal episode. The felony acts necessary to be committed in support of a RICO conviction, § 1961(1) (App. B-1), i.e., § 1951 (relating to interference with commerce), § 1503 (relating to obstruction of justice), etc., similarly lack any such scheme or episode requirements. Three of those criminal acts listed describe the use of a

scheme, namely, § 1341 (mail fraud) § 1343 (wire fraud), and § 2314 (relating to stolen property) (App. B-5). § 2314 states in pertinent part:

> "whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen . . . Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported . . ."

§ 2314 does not incorporate a scheme or intent to devise a scheme in each instance as a necessary element of proof for conviction. The acts of transporting stolen money, counterfitted securities, forged checks, or money gained by false pretenses are sufficient standing alone.

§ 2314 clearly indicates that a conviction may be supported using the false pretenses clause. If § § 1341 and 1343 are read in the light of § 2314, these statutes also fail to state that a scheme is necessary in each isntance as an element of proof. Money or property

gained by false pretenses sent by mail or wire is sufficient. See *Carpenter* v. *United States*, 484 U.S. ____ (1987) S. Ct. No. 86-422; *McNally* v. *United States*, 483 U.S. _____ (1987), S. Ct. No. 86-234. Significantly, any scheme used is necessary only to accommodate a conviction under the felony statute containing the scheme, § 1961(1). The next most likely place to find a scheme requirement is in § 1962(d) which prohibits conspiracy. However, § 1962(d) only requires an agreement between parties to violate subsections (a), (b), or (c) of this same section. Therefore, from the foregoing, it is evident that a pattern of racketeering activity does not contain a requirement for a scheme, and, in fact, such a scheme cannot be found as an essential requirement in any part of § 1962. Through evolution in the courts, the scheme criteria has erroneously become a RICO pattern requirement, even to the point of requiring multiple schemes.

Several Circuits have applied the criteria that the RICO pattern requirement was designed "to target

offenders who engage repeatedly in racketeering activities." *Superior Oil Co. v. Fulmer*, 785 F. 2d 252 (8th Cir. 1986). In this same vein, a pattern of racketeering activity that was allowed to flow from a single, limited scheme would undermine the intent that RICO serve as a weapon against ongoing unlawful activities whose scope and persistence pose a special threat to social well-being. *International Data Bank, Ltd., v. Zepkin*, 812 F. 2d 149 (4th Cir. 1987). In Superior Oil at 257, the Eighth Circuit stated:

> "there was not proof that [defendants] had ever done these activities in the past and there was no proof that they were engaged in other criminal activities elsewhere."

The foregoing is a far departure from the accepted and usual course of judicial proceedings, and would, with certainty, doom a person instituted civil RICO claim.

Apparently these courts have supplied the connotation that repeated racketeering activities signify offenders who are engaged in criminal activities elsewhere or who have been engaged in criminal activities in the past. Racketeering activity

is defined in § 1961 (1) and repetition of those acts listed should be sufficient without any further hint of other criminal involvement. Since *Sedima, S.P.L.Y. v. Imrex Company, Inc.*, 473 U.S. 479 (1985), this requirement has taken the place of a racketeering injury and prior conviction. This reasoning has now given rise to the multiple episode concept which has no more validity than the requirements put to rest in *Sedima*. § 1964(c) requires that injury need only be proven against the complainant.

The issue is further confused because the courts promulgating the single episode theory have used scheme and episode interchangeably, and applied various definitions. Although the RICO statute does not mention episode or scheme, the confusion may have arisen from *Sedima*, footnote 14, concerning the continuity plus relationship needed to produce a pattern. In the Fourth Circuit, continuity is not obtained by continuous unlawful acts committed by the perpetrator against one or more victims, but rather continuity must be demonstrated by acts that take

place in separate criminal episodes. A definition of continuity that is to be achieved by acts against different victims or acts spaced by undefined periods of time that are broken in sequence would seemingly employ Webster's definition of discontinuous, unless these acts are assigned to the wrongdoer to satisfy the definition of continuity.

A person may not have standing to prove criminal acts in separate episodes or the acts may not satisfy the court's interpretation of the relatedness requirement. Acts taking place in the same criminal episode are related but fail the continuity requirement using the definition applied by the Courts, resulting in a Catch-22 situation.

The scheme/episode and continuity/relatedness terminology have spawned so many various interpretations to have placed the RICO pattern requirement in severe jeopardy. These words have not been substantially defined or treated so as to insure a uniform RICO pattern requirement for all Circuits. In the case at hand, the courts found only one act

present, i.e., that of not paying the correct interest rate, even though the Board of Directors was required to set the interest rate to be paid each month under both federal and Maryland laws, and monthly payments were made.

The statute should be read in its plain text or the criminal acts conducted by the perpetrators used, in their concrete form, to define a pattern of racketeering activity. If a scheme is ever required, it should be used only in the proof of the statute in which it appears, and not as a part of the requirement to prove a pattern of racketeering activity.

The lack of uniformity among Circuits in setting the RICO pattern requirement demands the attention of this Honorable Court to set the standards for "a pattern of racketeering activity" in the best interests of justice. The Fourth Circuits disparate treatment of federally prosecuted and person instituted RICO claims has placed an unduly burdensome restriction on citizen complaints. The concept that a person must prove past criminal conduct, or ongoing criminal

conduct elsewhere, against an offender to establish a RICO claim is a serious departure from accepted judicial proceedings. The Petitioner alleged forty-three criminal acts which took place over a forty-month period, and sought class action representation. Standard Federal is continuing to underpay earned interest to current depositors. This was not a single limited scheme to defraud as decided by the courts of the Fourth Circuit, but on ongoing unlawful action encompassing a large number of victims. The "pattern" definition found in 18 U.S.C. § 3575(e) requires the assessment of an excessive number of variables as to degree of sufficiency, and simply is unworkable. This Honorable Court should set the standards for a pattern of racketeering activity to insure that person instituted civil RICO claims receive the same equal and uniform treatment in all Circuits.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

Bill J. Cory

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(703) 938-3589

11 MAY 1988

APPENDIX A

NOTICE OF ISSUANCE OF MANDATE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

April 21, 1988

TO: U. S. District Court for the
District of Maryland at Baltimore

RE: 87-3767 Cory v. Standard Federal
CA-86-1449

HEREWITH IS THE MANDATE OF THIS COURT IN THE ABOVE-ENTITLED APPEAL. The certified judgment and original record on appeal are returned only to the district court/agency.
Enclosures:

X Opinion and Certified copy of the judgment

____ Bill of costs form

X Original record on appeal consisting of

1 Volumes of pleadings

__ Volumes of transcripts

__ Volumes of exhibits

__ Volumes other

1 TOTAL VOLUMES

___ The record will be returned at a later date.

___ The record was never transmitted by the D/Ct.

___ Other _____

Please acknowledge receipt of these documents on the enclosed copy of this notice.

JOHN M. GREACEN,
Clerk

By: SANDRA TAYLOR
_____
Sandra Taylor
Deputy Clerk

Copies of this notice forwarded to:

Bill J. Cory
David Machanic, Esq.
Joan Langworthy Loizeau, Esq.

"UNPUBLISHED"

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-3767

BILL J. CORY

Plaintiff - Appellant

v.

MARVIN R. LANG; ROBERT W. ZAUGG;
STANDARD FEDERAL SAVINGS BANK

Defendants - Appellees

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph C. Howard, District Judge. (C/A No. 86-1449)

Submitted: February 29, 1988 Decided: March 31, 1988

Before HALL, SPROUSE, ERVIN, Circuit Judges.

(Bill J. Cory, Appellant Pro Se. David Machanic, Warren L. Miller, Joan Langworthy Loizeaux, Pierson, Ball & Dowd, for Appellees.)

PER CURIAM:

Bill J. Cory, a Virginia resident, appeals from the district court's dismissal without prejudice of his complaint, seeking civil RICO liability pursuant to 18 U.S.C. § § 1961, et seq. Cory's complaint alleged that Standard Federal had committed a "pattern" of racketeering activity by allegedly underpaying him interest on his T-bill Plus account 36 times over a forty month period. We affirm.

The district court properly found that Cory had failed to allege a "pattern" of racketeering activity. Even assuming Cory sufficiently alleged that the defendants constituted a "enterprise" that perpetrated a fraudulent scheme against him, the complaint still "failed to charge the kind and degree of continuous engagement in criminal conduct required to constitute a RICO 'pattern.'" Eastern Publishing & Advertising, Inc. v. Chesapeake Publishing & Advertising, Inc., 831 F.2d 488, 492 (4th Cir. 1987). See International Data Bank, Ltd. v. Zepkin, 812 F.2d 149 (4th Cir. 1987).

We dispense with oral argument because the dispositive issues have recently been decided authoritatively.

AFFIRMED

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

October 5, 1987

Mr. Bill J. Cory
Apt. 204
2574 Chain Bridge Road
Vienna, Virginia 22180

Warren L. Miller, Esq.
1200 18th Street, N.W.
Suite 1000
Washington, D.C. 20036

Re: Cory v. Standard Federal Savings and Loan Association
Civil No. JH-86-1449

Gentlemen:

The Court's Memorandum dated September 21, 1987 states that plaintiff had failed to amend his complaint. Actually, plaintiff did file an amendment after the Magistrate issued his Report and Recommendation. Coming after the Report, however, such an amendment is untimely and of no effect. Furthermore, the "amendment," as the initial complaint, fails to state a cause of action.

The Court's Memorandum is, therefore, amended to strike the following sentence from part II on page 7: "Also, plaintiff still has not come forward with the amendment even after the cancelled hearing."

Notwithstanding the informal nature of this letter, it is an order in this case.

Very truly yours,

Joseph C. Howard

JCH:dp
Original: Court file
Copies: Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BILL J. CORY :

V. : CIVIL NO. JH-86-1449

STANDARD FEDERAL SAVINGS AND LOAN ASSOCIATION, ET AL :

MEMORANDUM

Plaintiff, Bill J. Cory, filed a *pro se* complaint pursuant to 18 U.S.C § § 1961-1968, the Racketeer Influenced and Corrupt Organizations [RICO] statute, naming as defendants Standard Federal Savings and Loan Association [Standard], Marvin R. Lang, and Robert W. Zaugg. Defendant Standard allegedly guaranteed interest on plaintiff's money market account at the rate of 1% over the three month U.S. treasury bill auction rate so long as the account balance exceeded $2,500. Plaintiff contends that he did not receive the guaranteed interest rate, even though he maintained the minimum balance. In his complaint, plaintiff claims that defendants engaged in a pattern of racketeering activity through the

commission of wire and mail fraud in violation of 18 U.S.C. § 1962(c). As a result, Mr. Cory claims compensatory damages in the amount of $200,000 and punative damages in the amount of $300,000.

Pending before the Court is Magistrate Klein's Report and Recommendation on nine motions: the motion to dismiss of defendants Standard and Lang, defendant Zaugg's motion to dismiss (which incorporated defendant's Standard and Lang's motion to dismiss by reference); plaintiff's motion for judgment; plaintiff's motion to compel answers; defendant Lang's motion for Rule 11 sanctions; plaintiff's motion for default judgment; plaintiff's motion to order matter admitted; plaintiff's motion for summary judgment; and plaintiff's motion to amend the complaint.

I.

Magistrate Klein recommended that defendant Standard's motion to dismiss be granted. This recommendation is based on two grounds.

A.

Plaintiff must first demonstrate relatedness and *continuity* in order for a complaint to be actionable under the RICO statute. *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 53 U.S.L.W. 5034, 5038 n.14 (July 1, 1985). In *Sedima*, the Supreme Court recognized that two acts do not necessarily establish the required continuity and "pattern of racketeering activity." *ID.*

District Courts in the Fourth Circuit hold that the racketeering activities must occur in different criminal episodes to fulfill the continuity requirement in *Sedima Forstmann v. Culp*, 648 F.Supp. 1379, 1388 (M.D.N.C. 1986); *HMK Corp. v. Walsey*, 637 F.Supp. 710, 712 n. 2 (E.D. Va. 1986). Thus, continuity "presumes repeated criminal *activity*, not merely repeated *acts* to carry out the same criminal activity." *Forstmann v. Culp*, 648 F.Supp. at 1388 n.9 (quoting *Northern Trust Bank/O'Hare N.A. v. Inryco, Inc.*, 615 F.Supp. 828, 831 (N.D. Ill. 1985) (emphasis in original)). The requirement of criminal episodes, in fact, is the general consensus among the courts.

Forstmann v. *Culp*, 648 F.Supp. at 1388 (quoting *Frankart Distributors, Inc.* v. *RMR Advertising*, 632 F.Supp. 1198, 1200 (S.D.N.Y. 1986)). In the present case there are only repeated acts which carry out the same allegedly criminal activity. All of the criminal acts alleged by Mr. Cory arose in the course of one single episode and were related to only one activity, that is, omissions with regard to the interest rate offered and paid by Standard. Therefore, these acts do not constitute a pattern of different criminal episodes as required under RICO.

Plaintiff objects to this recommendation on the ground that the requirement of the criminal episode is an incorrect interpretation of the continuity requirement of the statute, and cites *Morgan* v. *Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986) to support his position. *Morgan* used the phrase "an overall scheme," *Id.* at 976, instead of criminal episode, and plaintiff asserts that a scheme is all that is required to constitute continuity for the purposes of the racketeering statute. The overall scheme in *Morgan*,

however, consisted of distinct acts of mail fraud, some of which were related to two separate foreclosure sales that occurred years apart. *Id.* Even if this Court were to adopt the phrase overall scheme, the facts of the present case involving the nonpayment of a guaranteed rate of interest do not establish the type of overall scheme which concerned the court in *Morgan*.

Plaintiff also objects to this interpretation of the statute claiming that it reads the RICO statute to narrowly. In support of his position, Mr. Cory cites *Sedima*. Although *Sedima* did hold that the Second Circuit had construed the racketeering statute too narrowly, that holding struck down the Second Circuit's requirement of an "additional, amphorous 'racketeering *injury*'", *Sedima*, 53 U.S.L.W. at 5038 (emphasis added). The present case deals with the entirely separate requirement of a pattern of activity, *see*, 18 U.S.C. § 1961(5).

In addition, Mr. Cory objects to the Magistrate's recommendation maintaining that *American National Bank and Trust Co. v. Harco, Inc.*, 473 U.S. 606 (1985)

is controlling. Plaintiff asserts that Standard's underpayment of interest in the present case is analogous to the excessive interest charges addressed in *Harco*. In *Harco*, the continuity requirement was satisfied because the case dealt with several loans made by the defendants, *see*, *Harco v. American National Bank and Trust Co.*, 577 F.Supp. 111, 112 (discussion of facts in district court opinion). In the present case, the complaint addresses plaintiff's single money market account.

Finally, Mr. Cory objects to the Report and recommendation arguing that defendants cheated him each month on dollar amount computed for interest payments; therefore, the acts of each month establish the continuity requirement. This Court finds that there is only one act complained of, namely, the nonpayment of the correct interest rate. This one act was repeated to carry out the same criminal activity, but it does not establish the pattern of racketeering activity necessary for plaintiff to prosecute a civil RICO case.

B.

Magistrate Klein also recommended defendant's motion be granted based upon the requirement of an enterprise for a violation of the RICO statute, *see*, *Sedima* at 5038-39. Plaintiff's complaint alleges that Standard is the enterprise involved in the alleged racketeering activity. Courts in this Circuit have held that the enterprise involved in a RICO case must be separate from the persons conducting the violating activity, and the enterprise cannot be a defendant in a suit brought under 18 U.S.C § 1964. *United States* v. *Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). In the present case, Standard is both the alleged enterprise and the defendant; plaintiff therefore, has failed to allege the involvement of a proper enterprise.

Mr. Cory objects to the Magistrate's Recommendation, arguing that *Computer Sciences* is distinguishable from the present case. Specifically, Mr. Cory contends that *Computer Sciences* is a criminal case, and not applicable to this civil action.

The courts, howerer, have consistently applied the holding of *Computer Sciences* to civil RICO cases. *See e.g., Nunes v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 609 F.Supp. 1055, 1065 (D. Md. 1985); *Burgon v. Heinhold Commodities, Inc.*, 646 F.Supp. 360, 363 (E.D. Va. (1986); *Witt v. South Carolina National Bank*, 613 F.Supp. 140, 143-44 (D.S.C. 1985); *Tryco Trucking Co. v. Belk Store Services, Inc.*, 608 F.Supp. 812, 817 (W.D.N.C. 1985); *Umstead v. Durham Mills, Inc.*, 592 F.Supp. 1269, 1271 (M.D.N.C. 1984); *In re Action Industries Tender Offer*, 572 F.Supp. 846, 849 (E.D. Va. 1983). This Court will do the same and holds that plaintiff has not alleged racketeering conduct on the part of an enterprise for this action to be maintained pursuant to the RICO statutes.

Plaintiff also objects to this recommendation on the basis that Standard is not the enterprise, as stated in his complaint, but instead it is Standard's parent company, Standard Holding Company. The Court notes that this substitution cannot now be made by way of objections. Even if it were properly alleged in Mr.

Cory's complaint, this would not save the lack of continuity and pattern of racketeering activity. Finally, plaintiff's assertion that *respondeat Superior* and agency laws should apply is dismissed as frivolous.

Plaintiff has failed to allege a claim under the RICO statute and therefore, the defendant's motion to dismiss is granted. The granting of defendant's motion to dismiss renders moot plaintiff's motion to compel answers, defendant Lang's motion for Rule 11 sanctions, plaintiff's motion for default judgment, plaintiff's motion to order matter admitted, and plaintiff's motion for summary judgment.

II.

There still remains plaintiff's motion to amend his complaint as well as plaintiff's motion for judgment.

Mr. Cory failed to include the amended complaint or describe the amendment he wished to make. Because the Court cannot speculate as to what plaintiff's amendment would be, Magistrate Klein recommended that the motion to amend be denied.

Plaintiff objects to this recommendation on the ground that he was the only one to appear at a cancelled motions hearing. A hearing, however, is not required for a motion to amend a complaint. Local Rule 6(j). Also, plaintiff still has not come forward with the amendment even after the cancelled hearing. Accordingly, plaintiff's motion to amend his complaint is denied.

In his motion for judgment, Mr. Cory requested reimbursement for the cost of personal service on defendant Zaugg, pursuant to Fed.R.Civ.P. 4(c)(2)(D). The Magistrate found that:

> "[t]he record reflects the process was issued pursuant to Fed.R.Civ.P. 4(c)(2)-(C)(ii) on May 22, 1986, and that the summons for defendant Zaugg was returned unexecuted on June 9, 1986 because Mr. Zaugg was not at the address listed. (*See* papers filed behind Paper No. 4). A private process server was appointed on July 10, 1986 (Paper No. 5), and service was made on defendant Zaugg at a different address on July 29, 1986. (Paper No. 10). In *Henry v. Glaize Maryland Orchards, Inc.*, 103 F.R.D. 589 (D.Md. 1984), this Court held

> that 'a defendant must actually receive the Rule 4(c)(2)(C)(ii) mailing and must fail to react to the form 18-A notices in a timely fashion, before Rule 4(c)(2)(D) becomes applicatle.' *Id.* at 590. In the instant case, defendant Zaugg did not receive the Rule 4(c)(2)(C)(ii) mailing and the summons was therefore returned unexecuted. Thus, in accordance with *Henry*, Rule 4(c)(2)(D) does not apply, and plaintiff's motion for judgment should be denied."

Magistrate's Report and Recommendation at 4. This Court agrees with the Magistrate's Recommendation.

Mr. Cory objects to this recommendation arguing that the Clerk's Office or the U.S. Marshal made an error, and the responsible agency should reimburse plaintiff. Mr. Cory, however, incorrectly assigns responsibility to the Clerk or U.S. Marshal. Pursuant to Fed.R.Civ.P. 4(a) it is the "plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons . . ." . Thus, Mr. Cory's objection is without merit and the motion for judgment is denied.

III.

Plaintiff has also raised objections not directly related to the Magistrate's recommendations.

First, Mr. Cory's request for class action certification is denied; it is improperly raised in his objections.

Next, plaintiff objects to the Magistrates' finding that Mr. Cory maintained a balance in excess of $2,500 for the majority of interest periods. Plaintiff claims that he maintained the $2,500 balance for all of the interest periods. Mr. Cory has simply misread the Magistrate's recommendation. The clause "for the majority of interest periods," Magistrate's Report and Recommendation at 2, modifies how often plaintiff did not receive the guaranteed interest rate; the clause does not modify the account balance.

Finally, plaintiff attempts to assert in his objections a claim based on Maryland State law. Because this Court has rejected plaintiff's RICO complaint, and because there is no diversity, this Court has no jurisdiction to hear the state law claim,

see 28 U.S.C. § § 1331, 1332. In any event, the claim is improperly raised in plaintiff's objections to the Magistrate's Report and Recommendation.

Accordingly, defendants Standard, Lang and Zaugg's motions for dismissal are granted, and all other motions are denied.

The Court will enter a separate Order.

Joseph C. Howard
United States
District Court Judge

Dated: 9/21/87

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BILL J. CORY	:	
V.	:	CIVIL NO. JH-86-1449
STANDARD FEDERAL SAVINGS AND LOAN ASSOCIATION, ET AL.	:	

ORDER

Accordingly, it is this 21st day of Sept., 1987, by the United States District Court for the District of Maryland,

ORDERED:

1. That the Report and Recommendation of Clarence E. Goetz, Chief United States Magistrate for the District of Maryland, BE, and the same hereby IS, ADOPTED;

2. That the motion to dismiss of defendants Standard, Lang, and Zaugg BE, and the same hereby IS, GRANTED;[1]

3. That plaintiff's motion for judgment BE, and the same hereby IS, DENIED;

4. That plaintiff's motion to compel answers BE, and the same hereby IS, DENIED;

5. That defendant Lang's motion for Rule 11 sanctions BE, and hereby IS, DENIED;

6. That plaintiff's motion for default judgment BE, and hereby is, DENIED:

7. That plaintiff's motion to order matter admitted BE, and hereby IS, DENIED;

8. That plaintiff's motion for summary judgment BE, and hereby IS, DENIED;

---

[1]Plaintiff's RICO count is dismissed without prejudice, specifically for the requirement that a RICO complaint allege a separate person and enterprise, as well as the requirement of continuity.

9. That plaintiff's motion to amend his complaint, BE, and hereby IS, DENIED; and

10. That the Clerk shall mail copies of the foregoing Memorandum and of this Order to the plaintiff and counsel of record.

Joseph C. Howard
United States
District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BILL J. CORY :

v. CIVIL ACTION NO.:
JH-86-1449

STANDARD FEDERAL SAVINGS AND LOAN ASSOCIATION, ET AL :

::::::::::::

MAGISTRATE'S REPORT AND RECOMMENDATION

On May 8, 1986, plaintiff, Bill J. Cory, filed a *pro se* complaint pursuant to 18 U.S.C § 1961 *et seq.*, the Racketeer Influenced and Corrupt Organizations [RICO] statute, naming as defendants Standard Federal Savings and Loan Association [Standard], Marvin R. Lang, and Robert W. Zaugg. Nine motions are presently pending: (1) the motion to dismiss of defendants Standard and Lang filed June 18, 1986 (Paper No. 3) (2) defendant Zaugg's motion to dismiss filed August 7, 1986 (Paper No. 8); (3) plaintiff's motion for judgment filed September 8, 1986 (Paper No. 12); (4) plaintiff's motion to compel answer filed September 8, 1986 (Paper No. 13); (5) defendant

Lang's motion for Rule 11 Sanctions filed September 19, 1986 (Paper No. 14); (6) plaintiff's motion for default judgment filed October 8, 1986 (Paper No. 20); (7) plaintiff's motion to order matter admitted filed October 8, 1986 (Paper No. 21); (8) plaintiff's motion for summary judgment filed November 17, 1986 (Paper No. 24) and (9) plaintiff's motion to amend the complaint filed March 20, 1987 (Paper No. 31). No hearing is deemed necessary. Local Rule 6.

In his complaint, plaintiff contends that, in response to a newspaper advertisement and correspondence, he deposited more than $2,500 in a money market account with defendant Standard. Plaintiff asserts that defendant Standard guaranteed interest on the account at the rate of 1% over the three month U. S. treasury bill auction rate so long as the account balanced exceeded $2,500. Plaintiff states that, even though he always maintained a balance in excess of $2500, for the majority of interest periods, he did not receive the guaranteed interest rate. He asserts that the defendants engaged in a

pattern of racketeering activity through the commission of wire and mail fraud in violation of 18 U.S.C. § 1962(c). As a result, plaintiff claims compensatory damages in the amount of $200,000 and punitive damages in te amount of $300,000.

The Supreme Court has recently held that "[a] violation of § 1962(c). . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. . . . [T]he plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation" *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 53 U.S.L.W. 5034, 5038-39 (July 1, 1985). (footnote omitted). It is clear that plaintiff is claiming that Standard is the enterprise involved in the alleged racketeering activity. Courts in the Fourth Circuit have held that the enterprise being operated must be separate from the persons conducting the violating activity, and, therefore, the enterprise cannot be a defendant in a suit brought under 18 U.S.C. § 1964. *United States v. Computer*

Sciences Corp., 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); *Witt* v. *South Carolina National Bank*, 613 F.Supp. 140, 143 (D.S.C. 1985); *Umstead* v. *Durham Hosiery Mills, Inc.*, 592 F.Supp. 1269, 1271 (M.D.N.C. 1984). Thus, it is recommended that defendant Standard's motion to dismiss be granted.

In *Sedima*, the Supreme Court recognized that two acts do not establish a pattern of racketeering activity." *Sedima*, 53 U.S.L.W. at 5038 n. 14. It is necessary to demonstrate continuity and relatedness to show a pattern of activity. *Id.* This Court has interpreted *Sedima*'s footnote 14 to require the racketeering activities to occur in different criminal episodes to fulfill the continuity requirement. *See Gatoil (U.S.A.), Inc.* v. *Forest Hill State Park*, Civil Action No. JH-84-873, slip op. at 6 (May 2, 1986); *H.A. Knott Limited, Inc.* v. *Intelligence Interlink Corp.*, Civil Action No. R-85-4213, slip op. at 2-3 (Feb. 27, 1986) (copies attached hereto). In *Gatoil*, the acts complained of all arose out of a joint venture

relationship between the parties. Similarly, the acts in *Knott* were the result of the fraudulent collection of a note. In the instant case, there is only one act complained of: the nonpayment of a guaranteed rate of interest on a type of bank account. This one act does not establish a pattern of racketeering activity necessary to prosecute a civil RICO case. Therefore, the motion to dismiss of defendants Lang and Zaugg should be granted.

The aforegoing recommendations render moot plaintiff's motion to compel answer (Paper No. 4), defendnat Lang's motion for Rule 11 sanctions (Paper No. 14), plaintiff's motion for default judgment (Paper No. 20), plaintiff's motion to order matter admitted (Paper No. 1), and plaintiff's motion for summary judgment. (Paper No. 24).

In his motion for judgment (Paper No. 12), plaintiff requests reimbursement for the cost of personal service on defendant Zaugg, pursuant to Fed. R. Civ. P. 4(c)(2)(D). The record reflects that process was issued prusuant to Fed. R. Civ. P. 4(c)(2)(C)(ii) on

May 22, 1986, and that the summons for defendant Zaugg was returned unexecuted on June 9, 1986 because Mr. Zaugg was not at the address listed. (*See* papers filed behind Paper No. 4). A private process server was appointed on July 10, 1986 (Paper No. 5), and service was made on defendant Zaugg at a different address on July 29, 1986. (Paper No. 10). In *Henry v. Glaize Maryland Orchards, Inc.*, 103 F.R.D. 589 (D.Md. 1984), this Court held that "a defendant must actually receive the Rule 4(c)(2)(C)(ii) mailing and must fail to react to the form 18-A notices in a timely fashion, before Rule 4(c)(2)(D) becomes applicable." *Id.* at 590. In the instant case, defendant Zaugg did not receive the Rule 4(c)(2)(C)(ii) mailing and the summons was therefore returned unexecuted. Thus, in accordance with *Henry*, Rule 4(c)(2)(D) does not apply, and plaintiff's motion for judgment should be denied.

On March 20, 1987, plaintiff filed a motion to amend the complaint. (Paper No. 31). However, plaintiff failed to include the amended complaint or

describe the amendment he wished to make. Even after the defendants filed their opposition (Paper No. 32), plaintiff did not come forward to particularize his amendment. Because this Court cannot speculate as to what plaintiff's amendment would be, his motion should be denied.

Accordingly, for the foregoing reasons, it is respectfully recommended that upon the expiry of the time for taking exception hereto, an Order be entered granting the motions to dismiss of defendants Standard, Lang, and Zaugg, denying plaintiff's motion for judgment and motion to amend the complaint, and denying all other pending motions as moot.

DATE: May 29, 1987

DANIEL E. KLEIN, JR.
UNITED STATES
MAGISTRATE

APPENDIX B

FEDERAL STATUTORY PROVISIONS INVOLVED

TITLE 18 U.S.C

In pertinent part:

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud, section 1503 (relating to obstruction of justice) section 1510 (relating to obstruction of criminal investigations) section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering

paraphernalia) section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2314 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to whiteslave traffic), (c) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (d) any offense involving fraud connected with a case under title 11, fraud in sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(5) "pattern of racketeering activity requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

§ 1962. Prohibited activities

(a) it shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interest or foreign commerce. A purchase of securities on the open market for purposes of investment and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under

this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections[1] (a), (b), or (c) of this section.

(Added Pub. L. 91-452, Title IX § 901(a), Oct. 15, 1970, 84 Stat. 942.)

§ 1964. Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

(June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139 § 34, 63 Stat. 94; Aug. 12, 1970, Pub.L. 91-375, § 6(j)(11), 84 Stat. 778.)

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

(Added July 16, 1952, c. 879, § 18(a), 66 Stat. 722, and amended July 11, 1956, c. 561, 70 Stat. 523.)

§ 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

June 25, 1948, c. 645, 62 Stat. 806; May 24, 1949, c. 139, § 45, 63 Stat. 96; July 9, 1956, c. 519, 70 Stat. 507; Oct. 4, 1961, Pub.L. 87-371, § 2, 75 Stat. 802; Sept. 28, 1968, Pub.L. 90-535,82 Stat. 885.

(2)

No. 87-1854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BILL J. CORY,

Petitioner,

v.

STANDARD FEDERAL SAVINGS AND LOAN ASSOCIATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS STANDARD FEDERAL SAVINGS AND LOAN ASSOCIATION, MARVIN R. LANG, AND ROBERT W. ZAUGG

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July 14, 1988

QUESTIONS PRESENTED

(1) Whether a civil RICO complaint under 18 U.S.C. § 1962(c) alleging that a Saving & Loan Association failed to pay one account holder a promised rate of interest on an account over a 40-month period was properly dismissed for failing to allege a "pattern of racketeering activity."

(2) Whether a civil RICO complaint under 18 U.S.C. § 1962(c) was properly dismissed when the "person" alleged to be operating an "enterprise" through a pattern of racketeering activity was also the enterprise.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS STANDARD FEDERAL SAVINGS AND LOAN ASSOCIATION, MARVIN R. LANG, AND ROBERT W. ZAUGG

Respondents Standard Federal Savings and Loan Association [hereinafter "Standard"], Marvin R. Lang, and Robert W. Zaugg respectfully request that this Court deny the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on March 31, 1988.[1]

---

[1] Standard has no parent companies, subsidiaries, or affiliated corporations which are required to be listed by Rule 28.1 of the Rules of this Court.

STATEMENT OF THE CASE

Petitioner Bill J. Cory seeks review of an unpublished decision of the United States Court of Appeals for the Fourth Circuit affirming the dismissal of Cory's complaint by the United States District Court for the District of Maryland. Cory filed his *pro se* complaint in the district court on May 22, 1986 alleging that Standard, Lang, and Zaugg (who are or were officers of Standard) violated Section 1962(c) of the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1961-65, in handling Cory's T-Bill Plus Money Market Account.[2]

The complaint alleged that Cory deposited $2500 in a T-Bill Plus Account, relying on promises that Standard would pay a certain minimum interest rate, and that Standard thereafter changed that rate without notice.[3] All defendants filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Among other things, the defendants argued that the complaint did not allege a "pattern of racketeering activity" as defined in 18 U.S.C. § 1961(5). In response, Cory contended that the alleged underpayment of interest 36 times over a period of 40 months constituted a sufficient "pattern."

While the motion to dismiss was pending and discovery proceeding, Cory filed a motion for summary judgment.[4] Before the district court took action on that

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[2] Cory previously filed a nearly identical complaint in the United States District Court for the Eastern District of Virginia. That complaint was dismissed due to improper venue on April 18, 1986.

[3] Since Petitioner seeks review of a decision dismissing his complaint, the facts pleaded in the complaint must be accepted as true. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

[4] Petitioner conceded in the motion for summary judgment that the total interest he alleged was underpaid amounted to approximately $1,000.00. Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, Exh. 8 (filed Nov. 14, 1986).

motion, Cory moved to amend the complaint, although no proposed complaint was submitted. The district court referred all of the pending motions to the United States Magistrate for review and recommendation.

On May 29, 1987, the Magistrate filed a report recommending that the motion to dismiss be granted and that Cory's motion for leave to amend be denied due to his failure to either include a proposed amended complaint or describe the amendment. Pet. App. A24-A30. Cory subsequently lodged a proposed amended complaint with the Clerk of the district court.

On September 21, 1987, the district court adopted the recommendation of the Magistrate and granted the motion to dismiss. Pet. App. A8-A23. The district court held that the complaint failed to allege a "pattern of racketeering activity" sufficient to support a RICO claim. In addition, the court found that Cory had alleged both that Standard was a "person" conducting an enterprise through racketeering activity and that Standard was the enterprise, contrary to the rule of *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). Pet. App. A14-A16.[5]

Cory appealed the decision to the United States Court of Appeals for the Fourth Circuit, claiming jurisdiction under 28 U.S.C. § 1291. That court, in an unpublished decision, affirmed the dismissal of the complaint. Pet. App. A3-A5. It held:

> "The district court properly found that Cory had failed to allege a 'pattern' of racketeering activity. Even assuming Cory sufficiently alleged that the defendants constituted a [sic] 'enterprise' that perpetuated a fraudulent scheme against him, the com-

[5] The District Court also denied Cory's motion to amend the complaint. The Court found that the amendment was submitted untimely and "as the initial complaint, fails to state a cause of action." Pet. App. A6.

> plaint still 'failed to charge the kind and degree of continuous engagement in criminal conduct required to constitute a RICO "pattern."' *Eastern Publishing & Advertising Inc. v. Chesapeake Publishing & Advertising, Inc.*, 831 F.2d 488, 492 (4th Cir. 1987)." Pet. App. A4.

ARGUMENT

I. The Petition Does Not Present Any Issue Worthy of Review by this Court

Respondents recognize that the Court recently agreed to consider the question of what acts may be sufficient to constitute a "pattern of racketeering activity" under 18 U.S.C. § 1962(c). *H.J. Inc. v. Northwestern Bell Telephone Co.*, 56 U.S.L.W. 3647 (U.S. March 21, 1988) (No. 87-1252). Nonetheless, the petition should be denied because Petitioner's complaint did not allege a sufficient pattern of racketeering activity under the standard established by any of the courts of appeals.

This Court earlier urged the lower courts "to develop a meaningful concept of 'pattern.'" *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985); *see also id.* at 527-28 (Powell, J., dissenting). In *Sedima*, the Court noted that while the language of § 1961(5) defining a "pattern of racketeering activity" requires a minimum of two separate acts, two acts may not be sufficient to establish a pattern. "[I]n common parlance two of anything do not generally form a 'pattern.'" *Id.* at 496 n.14. Quoting from the Senate Report on RICO, the Court pointed out that:

> "'The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.'"

Id. (quoting S. Rep. No. 617, 91st Cong., 2d Sess. 158 (1969) (emphasis by the Court). The Court also noted

the statement of Representative Poff that RICO was "'not aimed at the isolated offender.'" *Id.* (quoting *Hearings on S. 30 and Related Proposals Before Subcommittee No. 5 of the House Committee on the Judiciary*, 91st Cong., 2d Sess. 665 (1970)).

Following *Sedima*, the courts took a variety of approaches to formulating a more restrictive "pattern" requirement. Under any reasonable construction, however, the conduct alleged in Petitioner's complaint would not state a claim under RICO. Therefore, the petition for certiorari should be denied because the decision of the Fourth Circuit was clearly correct.

Petitioner's complaint alleged several predicate acts in furtherance of only one scheme. The complaint alleged two mailings in which Respondents promised to follow one formula in computing the interest on Petitioner's account and a series of subsequent uses of the mail to send Petitioner monthly statements of account, some of which reflected the results of interest calculated by a different formula.[6] Essentially, Petitioner charged one fraudulent act—changing the formula for calculating interest without notice.[7] The subsequent mailings were hardly inde-

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[6] As discussed in Argument II *infra*, these latter mailings cannot be viewed as mail fraud within the scope of 18 U.S.C. § 1341, and therefore should not be regarded as predicate acts. In addition, the petition for certiorari at pp. 7-8 discusses a number of additional allegations of fraudulent conduct. None of these appeared in Petitioner's complaint and they cannot be considered in determining its sufficiency. In addition, allegations that Respondents' advertising contained fraudulent material do not appear to allege either mail or wire fraud, and thus would not have constituted predicate acts for RICO purposes even had they been contained in the complaint.

[7] Standard's regulations which were appended to Petitioner's complaint reserved the right of Standard to revise or amend the regulations, which included the commitment concerning interest rates, at any time by posting a notice of the change in Standard's offices and by mailing a written notice to all account-holders. T-Bill Plus Account Rules and Regulations ¶ 11. In opposing Petitioner's

pendent acts of fraud, but merely part of the normal adjuncts of operating a savings account.

To Respondents' knowledge, no court of appeals since *Sedima* has sanctioned a civil RICO complaint where there have not been at least several independent criminal acts, as opposed to the mere repetition of a ministerial mailing charged in the instant complaint. Several courts have found that the continuity component of the pattern analysis suggested in *Sedima* requires that the plaintiff allege more than one criminal episode. *See, e.g., Torwest DBC, Inc. v. Dick*, 810 F.2d 925 (10th Cir. 1987); *Superior Oil Co. v. Fullmer*, 785 F.2d 252 (8th Cir. 1986).

Other courts have followed the Seventh Circuit in weighing several factors to determine whether a complaint alleges a pattern of racketeering activity. These factors include (i) the number and variety of predicate acts, (ii) the length of time over which they were committed, (iii) the number of victims, and (iv) the presence of separate schemes and distinct injuries. *See, e.g., Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986); *see also Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36 (3d Cir. 1987); *Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349 (3d Cir. 1987). The Fourth Circuit utilizes this case-by-case analysis. *See Walk v. Baltimore & Ohio Railroad*, No. 87-3585 (4th Cir. May 31, 1988); *HMK Corp. v. Walsey*, 828 F.2d 1071 (4th Cir. 1987), *cert.*

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motion for summary judgment, Respondents submitted uncontradicted affidavits that Standard had notified all holders of T-Bill Plus accounts that the interest formula was being changed, both by including notices to that effect in the same envelope as the monthly statements and by placing notices in each Standard branch office. Respondents also submitted uncontradicted affidavits of other holders of T-Bill Plus accounts confirming that they had received the notification of the change in interest formula.

denied, 108 S. Ct. 706 (1988); *International Data Bank v. Zepkin*, 812 F.2d 149 (4th Cir. 1987).

The Ninth Circuit also imposes a flexible test for the allegation of a pattern. However, it has concluded that the required continuity is not shown if the plaintiff alleges only a single fraud on a single victim. Such single frauds are the "isolated or sporadic" activity about which the Court expressed concern in *Sedima*. *United Energy Owners Committee, Inc. v. United States Energy Management Systems, Inc.*, 837 F.2d 356, 360 (9th Cir. 1988); *California Architectural Building Products v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1469 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988).

Finally, two Circuits have declined to adopt a particularized approach to the continuity component of the pattern requirement. The Second and Eleventh Circuits have focused on the number of related predicate acts as the sole requirement for establishing a pattern. *See United States v. Ianiello*, 808 F.2d 184, 189-93 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3229 (1987); *Bank of America v. Touche Ross & Co.*, 782 F.2d 966, 970-71 (11th Cir. 1986).[8]

Significantly, these cases have all involved allegations of several different fraudulent acts, albeit in furtherance of one scheme. For example, *Ianiello* involved a series of separate acts of skimming bar receipts, filing falsified tax returns, and filing fraudulent liquor licenses. 808 F.2d at 186-89. Similarly, in *Bank of America*, the plaintiffs alleged that the defendants prepared and dissemi-

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[8] The Second Circuit recently recognized that its cases have strayed from the strict focus on the number of predicate acts of *Ianiello* and a panel concluded that allegations of a single scheme would not be sufficient to support a RICO claim. *Beauford v. Helmsley*, 843 F.2d 103, 108-10 (2d Cir. 1988); *see, e.g., Creative Bath Products, Inc. v. Connecticut General Life Insurance Co.*, 837 F.2d 561, 564 (2d Cir. 1988).

nated a series of false financial statements. Each one constituted a different and independent act of fraud.

Under any of the tests established by the courts of appeals, the instant complaint was defective. Since only one scheme was alleged, the courts that have required allegations of multiple episodes would have rejected the complaint. Applying the Seventh Circuit's balancing analysis, Petitioner's complaint alleged only one type of predicate act, one victim, one scheme, and only one type of injury. The relevant factors overwhelmingly weigh against a finding of pattern, as the Fourth Circuit held. Since only a single fraud on a single victim was alleged in the complaint, it would also have been found defective under the Ninth Circuit's test.

Finally, the complaint also failed to pass muster even under the tests applied by the Second and Eleventh Circuits. Those courts have found the pattern requirement satisfied if there are several independent frauds committed in the furtherance of one scheme. The instant complaint, however, alleges only one act of fraud—the failure to pay interest at the promised rate. No matter how many months went by, the complaint can only be read to allege one fraudulent act. If the pattern requirement of 18 U.S.C. § 1962(c) has any meaning whatever, it must be read to exclude the sort of "garden variety" fraud involving only one type of conduct and one victim that was alleged in Petitioner's complaint. The allegations in the complaint exemplify the "isolated offender" that Congress sought to exclude from RICO.[9]

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[9] In a strikingly similar case to the one at bar, the district court in *Miller v. Moffat County State Bank*, 678 F. Supp. 247 (D. Col. 1988), concluded that no pattern had been alleged in a case in which the plaintiff claimed that a bank had systematically charged him interest on a loan that was higher than that originally agreed to. The court found that no matter how many months of interest payments had taken place, the complaint alleged only one injury—charging too much interest on one loan—and that was insufficient to establish a pattern of racketeering activity.

The petition for a writ of certiorari should therefore be denied because the Fourth Circuit properly concluded that the complaint did not allege the required pattern of racketeering activity.[10]

II. The Complaint Alleged Only Two Acts of Mail Fraud

While Petitioner (Pet. at 7-8) claims to have alleged 43 different predicate acts, the complaint in fact alleges only two acts which might come within the definition of mail fraud in 18 U.S.C. § 1341. The vast majority of the predicate acts alleged were mere routine mailings of monthly statements of the sort which this and other courts have repeatedly held cannot constitute mail fraud.[11]

Under the T-Bill Plus Account regulations which were appended to the complaint, "[s]tatements reflecting account activity, charges associated therewith, and the balance in the account shall be rendered to the depositor(s)

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[10] Since the question presented in the petition does not refer to Petitioner's submission of a proposed amended complaint, it appears that he has abandoned any arguments relating to the district court's failure to grant his motion for leave to amend. Sup. Ct. R. 21.1(a). In any event, the denial of leave to amend was entirely proper. No amendment was submitted at the time Petitioner filed his motion as required by Fed. R. Civ. P. 15(a). Further, when the proposed amendment was submitted, it continued to allege only the single underlying scheme described in the initial complaint. The district court thus correctly ruled that the amendment also failed to state a cause of action.

[11] Plaintiff also alleged that certain of Respondent Standard's advertisements were deceptive. The complaint did not allege that the placing of these advertisments involvd the use of interstate mail or wire communications. Therefore, they cannot be considered predicate acts for RICO purposes. Plaintiff in the petition (but not in the complaint) also appears to claim that Respondents' alleged failure to respond to an inquiry concerning the interest rate on his account is another predicate act. Of course, not using the mails cannot be construed as mail fraud under 18 U.S.C. § 1341.

at least on a monthly basis at Standard's convenience." T-Bill Plus Account Rules and Regulations ¶ 5. Thus, the mailings which Petitioner claims as predicate acts of fraud were routine statements which Respondents were legally obligated to send.[12]

In *Parr v. United States*, 363 U.S. 370 (1960), the Court held that legally compelled mailings of lawful financial documents were not mailed for the purpose of executing a fraudulent scheme within the scope of the mail fraud statute, even though the mailers were at the same time engaged in fraud. Like the mailings in *Parr*, the monthly statements sent to Petitioner were legally required, intrinsically innocent, and the complaint contains no allegation that they were anything but accurate. Assuming that the complaint validly charges the existence of a scheme to defraud, the mailing of the monthly statements was not part of the fraudulent scheme. *See United States v. Tarnopoul*, 561 F.2d 466, 472 (3d Cir. 1977) (applying rule in *Parr* to mailings "regularly employed to carry out a necessary or convenient procedure of a legitimate business enterprise"); *but see United States v. Bernhardt*, 840 F.2d 1441, 1446-47 (9th Cir. 1988).

Since under *Parr* the mailing of the monthly statements cannot be viewed as mail fraud, the only acts of mail or wire fraud alleged in the complaint were the mailing of two documents to Petitioner. Since *Sedima*, the courts have uniformly concluded that the mere allegation of two related predicate acts over a short period of time does not satisfy the pattern requirement. The complaint was therefore defective on its face and this case does not warrant review by this Court.

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[12] Notably, nothing in the account regulations gave any indication that the monthly statements would include the various interest rates applicable to the account during the previous period.

III. The Complaint Also Failed To Allege the Existence of an Enterprise

Even if the complaint had alleged a pattern of racketeering activity, it would still be subject to dismissal since it improperly cast Standard as both the enterprise and as a person conducting the affairs of an enterprise through a pattern of racketeering activity. 18 U.S.C. § 1962(c), the section on which Petitioner appears to rely, prohibits the conduct of the activities of an enterprise through a pattern of racketeering activity. In construing this section, the courts have concluded that the enterprise whose activities are affected may not also be the person alleged to be conducting the enterprise.

> "We conclude that 'enterprise' was meant to refer to a being separate from, not the same as or part of, the person whose behavior the act was designed to prohibit . . . . [W]e would not take seriously . . . an assertion that a defendant conspired with his right arm, which held, aimed and fired the fatal weapon."

United States v. Computer Sciences Corp., 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); *see Bennett v. U.S. Trust Co.*, 770 F.2d 308 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); *B.F. Hirsch v. Enright Refining Co.*, 751 F.2d 628 (3d Cir. 1984); *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

Petitioner alleged in the complaint both that Standard was the enterprise and one of the persons conducting its own affairs through a pattern of racketeering activity. "Standard *is an enterprise that conducted its affairs* through a pattern of racketeering activity. . . ." Complaint ¶ II(1) (emphasis added).

The district court found as an alternative ground that the complaint should be dismissed for failing to identify an enterprise separate from the alleged racket-

eering activity. Since Petitioner clearly identified Standard both as the enterprise and as one of the persons conducting that enterprise, it was entirely proper to dismiss the complaint.

The petition for certiorari should therefore be denied because even if the Court should determine that the complaint properly alleged a pattern of racketeering, the complaint would remain defective for its failure to allege the existence of an enterprise separate from the persons allegedly engaged in racketeering acts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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